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In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

GENERAL DYNAMICS CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition For a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

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Petition For a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

The petitioner, General Dynamics Corporation ("General Dynamics"), defendant and third party plaintiff in consolidated personal injury and wrongful death actions, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in this proceeding on April 15, 1976.

OPINIONS AND ORDERS BELOW

The Order of the United States District Court for the Northern District of California ("District Court"), granting the Motion of the United States of America ("USA") to dismiss the Third-Party Complaint of General Dynamics

against it for failure to state a claim upon which relief can be granted is reported at 385 F.Supp. 890 (N.D.Cal. 1974), and is reproduced herein as Appendix A. The opinion of the Court of Appeals, as yet unreported, is reproduced herein as Appendix B. The Order of the Court of Appeals denying petitioner's request for a rehearing in banc, entered on May 26, 1976, is reproduced herein as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1976. A timely Petition for Rehearing was denied by the Court of Appeals on May 26, 1976. This Petition for a Writ of Certiorari was filed within ninety days of that date, and is therefore timely. *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942), reh. den. 318 U.S. 802 (1943); *United States v. Healy,* 376 U.S. 75, 77-80 (1964). This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the United States of America may be held liable to indemnify a third party for damages which the third party pays to injured members of the United States Armed Forces, or to the representatives or heirs of deceased members of the United States Armed Forces, when those members, representatives, or heirs may not recover directly against the United States of America?

STATUTES INVOLVED

Two provisions of the United States Code are involved in the subject action. The Federal Tort Claims Act, 28 U.S.C. § 2674, provides as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof."

The provisions of 28 U.S.C. § 1346(b) read as follows:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT OF THE CASE

The parties to this appeal, General Dynamics and the USA, filed with the District Court an Agreed Statement of Facts on Appeal ("Agreed Statement"), which became a portion of the record before the Court of Appeals. In addition, the Order of the District Court originally appealed from granted the USA's Motion to dismiss General Dynamics' Third Party Complaint for failure to state a claim upon which relief can be granted. Thus, this Court,

in considering or reviewing the grant of such a motion, should treat all properly pled material allegations of the complaint as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Walker Process Equip. v. Food Mach. Chem. Corp.*, 382 U.S. 172, 174-75 (1965); *Dodd v. Spokane County, Washington*, 393 F.2d 330, 334 (9th Cir. 1968). For the convenience of this Court, there follows a review of the facts contained either in the Agreed Statement or in the properly pled material allegations of the Third Party Complaint.

During the latter part of the 1940's, General Dynamics designed, developed, and manufactured a civilian aircraft, designated as the Convair 240. The USA evidenced interest in purchasing a version of the Convair 240 for use as a military aircraft, and, pursuant to a contract with the USA, General Dynamics supplied the United States Air Force ("Air Force") with a version of the Convair 240, substantially similar to the civilian version, and bearing the military designation of T-29. On or about June 6, 1954, one particular T-29, bearing registration No. 5822, was delivered to the Air Force.

On delivery to the USA, the aforementioned aircraft was inspected and fully and formally accepted by the USA as conforming to its own specifications for use by the Air Force. On and after June 6, 1954, and through the sixteen year period immediately following such delivery, the USA had complete and exclusive custody of and control of the operation, inspection, repair, and maintenance of the subject aircraft.

On May 4, 1970, aircraft No. 5822 crashed shortly after take-off from Hamilton Air Force Base in Marin County, California. The aircraft, piloted by an Air Force officer, carried a crew of four Air Force personnel, and had nine Air Force personnel and one member of the United States

Army as passengers. All persons aboard the aircraft, with the exception of one passenger, were killed in the crash. All of the servicemen aboard the aircraft were on active duty and their activities at the time of the accident were incident to their military service.

In April of 1971, actions were filed against General Dynamics by the representatives of the deceased crew members and passengers, and by the sole surviving passenger, seeking recovery under the theories of negligence and strict liability. While said actions were originally filed in the courts of the State of California, the actions were removed by General Dynamics to the United States District Court for the Northern District of California, pursuant to the provisions of 28 U.S.C. § 1332.

On February 8, 1973, General Dynamics, by leave of Court, filed a Third Party Complaint against the USA. Said Third Party Complaint was within the original jurisdiction of the United States District Court for the Northern District of California pursuant to the provisions of 28 U.S.C. § 1346(b). The Third Party Complaint alleged, *inter alia*, that the USA was negligent, wanton and reckless in the inspection, maintenance, repair, and operation of the subject aircraft; specifically, the USA failed to manage, inspect, service, repair, maintain and operate said aircraft and its component parts in a proper and non-negligent fashion, and failed to warn, instruct, advise, educate and train the crew and occupants of the subject aircraft regarding the aircraft and its component parts, and their safe operation. It was further alleged that the acts and omissions of the USA were the sole, active and primary cause of the crash of the subject aircraft on May 4, 1970, the death of plaintiffs' decedents, and the injuries to the sole surviving serviceman. Finally, it was alleged that the

crash of the subject aircraft was not proximately caused by any act or omission, negligent or otherwise, in the design, manufacture, maintenance, or sale of the subject aircraft by General Dynamics.

The District Court initially denied the Motion of the USA to dismiss the Third Party Complaint for failure to state a claim upon which relief can be granted, by Order filed June 6, 1973, but, upon reconsideration, granted the Motion by Order filed December 2, 1974. It was the opinion of the District Court, relying heavily on *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964), that because the USA could not be liable directly to the injured serviceman, or to the representatives or heirs of the deceased servicemen, it could not be liable indirectly by virtue of liability for indemnity to a third party. After proper certification of the Order by the District Court, General Dynamics petitioned the Court of Appeals for leave to appeal pursuant to 28 U.S.C. § 1292 (b), and, on December 27, 1974, the Court of Appeals granted such leave. It is the judgment of the Court of Appeals, affirming the action of the District Court, which is the subject of this Petition.

REASONS FOR GRANTING THE WRIT

The legal conclusion of the Court of Appeals in the instant action perpetuates a clear and irreconcilable conflict between various United States Courts of Appeals on the precise question discussed herein, and on the broader question of which the subject question forms a logical part. On the precise question, whether or not a third party who pays damages to injured members, or to heirs or representatives of deceased members, of the United States Armed Forces ("military") may seek indemnity against the USA when those members, heirs or representatives

could not sue the USA directly, the Court of Appeals, joined by the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), reached a conclusion that is diametrically opposed to that reached on precisely the same issue by the United States Courts of Appeals for the Fifth ("Fifth Circuit"), Sixth ("Sixth Circuit"), and Tenth ("Tenth Circuit") Circuits. On the broader question, whether a third party who pays damages to any federal employee may seek indemnity against the USA, when the federal employee is barred from direct suit against the USA, the same conflict between the various Circuits remains, with the United States Court of Appeals for the Third Circuit ("Third Circuit") joining the Eighth and Ninth Circuits, and the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") joining the Fifth, Sixth, and Tenth Circuits. This conflict between the Circuits creates an inequitable situation in which the rights of litigants seeking indemnity against the USA depend entirely upon the fortuitous circumstances of geographical location of the litigants or the occurrence giving rise to suit, and, therefore, the rule of law of the Circuit in which indemnity is sought.

This Court has never ruled on the precise question here at issue, and petitioner respectfully suggests that such a ruling should be made, to resolve the aforementioned conflict between the Circuits. On the broader question, this Court has not ruled since 1963, and the rulings of this Court in 1963 have been the subject of disparate treatment and interpretation by the different Circuits. Petitioner urges that the rulings of this Court in *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963) and *Treadwell Construction Co. v. United States*, 372 U.S. 772 (1963) support the position of petitioner, and that a Writ of

Certiorari should issue to allow this Court to remove the present conflict between the Circuits, and bring those Circuits misconstruing this Court's 1963 mandate into line. If this Court is of the opinion that its decisions in the aforementioned two cases do not govern the subject issue, a Writ of Certiorari should issue to allow this Court to rule on the subject issue, and create harmony and uniformity between the Circuits on the question presented herein.

Petitioner respectfully suggests to this Court that its two decisions in 1963 did establish a precedent that governs the question raised herein, and that the judgment of the Court of Appeals was in direct contravention to that precedent, and should be overruled. In *Weyerhaeuser*, this Court permitted a shipowner who had satisfied the claim of an injured non-military federal employee to maintain a suit against the USA, seeking tort or equitable indemnity, despite the undisputed legal principal that the injured federal employee was barred by provisions of the Federal Employees Compensation Act ("FECA") from maintaining a suit directly against the USA, and despite the corollary principal that the USA could not be liable directly in damages to the injured federal employee. In allowing the prosecution of an indemnity claim by the third-party shipowner, this Court said

> "The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. *There is no evidence whatever that Congress was concerned with the rights of unrelated third parties . . .*" 372 U.S. at 601. (Emphasis added).

It was the opinion of this Court that the FECA, by express provision, provided an *exclusive* remedy for injured em-

ployees, or for those standing in the shoes of injured employees, against the USA, but that the same provision was not intended to, nor did it, establish the exclusive liability of the USA with regard to indemnity claims by unrelated third parties.

In *Treadwell,* this Court vacated a decision of the Third Circuit which held that the exclusive remedy provision of the FECA barred recovery of contribution from the USA when FECA compensation payments had been made by the USA to an injured government employee. This Court remanded the matter for treatment in conformity with its decision in *Weyerhaeuser*. After remand, the United States District Court allowed a third-party claim against the USA, notwithstanding the FECA provision, and the USA, after appealing, dismissed its appeal. [See *Hart v. Simons,* 223 F.Supp. 109, 111 n.1 (E.D. Pa. 1963)]. From the above two decisions, it appears that this Court, as early as 1963, was of the opinion that the bar against direct suit contained in the FECA did not preclude a third party action in indemnity against the USA, even in situations where the USA had paid compensation under the FECA to an injured employee, and could not be sued by the injured employee directly.

The above decisions concerned indemnity or contribution actions arising out of injuries to non-military governmental employees covered by the FECA, which expressly bars direct suit by the employees against the USA. Military personnel, not covered by the FECA, receive compensation from the USA pursuant to several statutes [e.g. 10 U.S.C. § 1071 et seq., 10 U.S.C. § 1201 et seq., 10 U.S.C. §§ 1475-82, and 38 U.S.C. § 101 et seq.], none of which by its terms bars direct suit against the USA. However, this Court established such a bar against direct suit by injured military personnel against the USA in *Feres v. United States,* 340

U.S. 135 (1950), a decision in which the right of third parties to seek indemnity against the USA was neither raised nor resolved.

In the year following the decisions of this Court in *Weyerhaeuser* and *Treadwell,* the Court of Appeals, in *United Air Lines, Inc. v. Wiener, supra,* concluded that the aforementioned two opinions were of no precedental value or persuasive effect, and denied the right of a third party to prosecute a claim for indemnity under circumstances similar to those present in the instant appeal. After discussing the propriety, or impropriety, of allowing the prosecution of claims for tort or equitable indemnity against the USA by third parties who paid damages to injured non-military governmental employees, covered by the FECA, and after concluding that the FECA provisions by implication barred such third party claims, the Court of Appeals, in cursory fashion, discussed the same questions regarding military personnel, disposed of those questions by total reliance on *Feres,* and concluded that no indemnity action could lie against the USA for damages paid to injured federal employees, whether military or non-military. The reasoning of the Court of Appeals, required to reach the aforementioned conclusion, was extraordinarily simple: without underlying *direct* liability on the part of the USA to the injured employees (FECA or *Feres*), the USA could not be liable indirectly for tort or equitable indemnity. In the instant appeal, the Court of Appeals briefly reviewed its decision in *Wiener,* following it without equivocation.

In asking the Court of Appeals to reexamine the position it enunciated in *Wiener,* petitioner brought to the attention of that Court a series of cases decided long after *Wiener,* cases which reached a contrary conclusion. As this Court can readily see from the opinion of the Court of Appeals, only cursory attention was given by the Court of Appeals

to some of those opinions[1], and others were ignored.[2] It is respectfully submitted to this Court that a careful analysis of the more recent opinions of the United States Courts of Appeals will lead to the inescapable conclusion that the greater weight of authority supports the contentions of petitioner, and casts serious doubt on the correctness of the judgment petitioner requests this Court to review.

When the Court of Appeals issued its judgment in the instant matter, it stood alone amongst Courts of Appeals in concluding that the bar constructed by *Feres* against direct suits by members of the military against the USA similarly barred suits for tort or equitable indemnity, on the part of third parties, against the USA. Three other United States Courts of Appeals had previously held or stated that the *Feres* doctrine did not bar such indemnity claims, and that the potentional liability of the USA for indemnity did not rest on any requirement of direct liability on the part of the USA to the individual member of the military who suffered injury.

In *Wellington Transportation Co. v. United States,* 481 F.2d 108 (6th Cir. 1973), a member of the United States Coast Guard on active duty was injured while a Coast Guard cutter was towing an automobile ferry free of ice. The injured Coast Guardsman filed suit in state court against the owner of the automobile ferry, seeking recovery for his injuries. The owner of the ferry successfully defended the suit and paid no damages to the injured Coast

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1. *Weyerhaeuser S.S. Co. v. United States, supra; Treadwell Construction Co. v. United States, supra; Wallenius Bremen G.m.b.H. v. United States,* 409 F.2d 994 (4th Cir.), cert. denied, 398 U.S. 958 (1969).

2. *Wellington Transportation Co. v. United States,* 481 F.2d 108 (6th Cir. 1973); *Certain Underwriters at Lloyd's v. United States,* 511 F.2d 159 (5th Cir. 1975).

Guardsman, but did incur $12,500 in attorneys' fees and defense costs. The ferry owner filed suit against the USA, alleging that the accident causing the injury to the Coast Guardsman was the result of the primary and active negligence of the USA, through its agents, and seeking equitable or tort indemnity.

The trial court found that the ferry owner was not negligent, but that the USA, through the crew of the Coast Guard cutter, was negligent. However, the trial court ruled that the ferry owner was without a remedy against the USA because of its assumption that the *Feres* doctrine, which barred direct suit on the part of the injured Coast Guardsman against the USA, likewise barred the claim of the ferry owner for tort indemnity against the USA. On appeal, the Sixth Circuit reversed the holding of the trial court:

> "We do not read *Feres v. United States, supra,* as presenting a bar to a third party's claim against the United States for indemnification of damages awarded to an injured serviceman and attorneys fees and expenses incident thereto. Rather, the *Feres* decision was concerned only with an injured serviceman's direct remedy against the United States, and nothing in the Court's opinion suggests that the holding of that case was intended to apply to a third party's claim for indemnity against the United States." 481 F.2d at 111.

The Sixth Circuit, finding support for its conclusion in this Court's opinions in *Weyerhaeuser* and *Treadwell,* allowed the prosecution of a claim for indemnity under factual circumstances virtually indistinguishable in principle from those present in the instant action.

In *Barr v. Brezina Construction Co.,* 464 F.2d 1141 (10th Cir. 1972), the Tenth Circuit followed the holding of *Weyerhaeuser* and *Treadwell,* and expressed an opinion directly

contrary to that expressed by the Court of Appeals in *Wiener* on the question presented in this petition. In *Barr,* a military plaintiff filed suit against a general contractor and its subcontractor as a result of injuries suffered in a fall down a stairway installed by the subcontractor in a building located on an Air Force base in Utah. Because the plans for the stairway had been furnished by the USA, and because the contractor alleged that it had brought to the attention of the USA the dangerous design of the stairway, but had been forced by the USA to follow the unchanged plans, the contractor sought tort or equitable indemnity against the USA. The trial court dismissed the third party complaint against the USA, concluding, as had the Court of Appeals in *Wiener,* that indemnity was barred by *Feres.*

The Tenth Circuit reversed the trial court, holding that an action based on the theory of tort indemnity could be maintained against the USA, despite the *Feres* bar. First, the Tenth Circuit expressed its understanding of the *Feres* doctrine:

> "The *Feres* doctrine limits a serviceman claimant seeking recovery against the United States to his remedy under the Military Claims Act. He cannot pursue the United States under the Federal Tort Claims Act 28 U.S.C. § 1346(b), because his remedy against the United States under the Military Claims Act is exclusive of all other remedies. But it does not follow that a defendant-third-party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations." 464 F.2d at 1143.

Next, the Tenth Circuit considered this Court's decision in *Treadwell:*

> "We read this per curiam opinion as merely holding that the exclusive remedy of the employee does not prevent a third-party action." 464 F.2d at 1143 n.5.

Finally, the Tenth Circuit denied indemnity in *Barr,* but only because of the specific facts of the case, and the applicable state law. There can be no question, however, that the Tenth Circuit, in *Barr,* recognized the right of a third-party plaintiff to pursue a tort indemnity claim against the USA under the circumstances there present. While the *grant* of indemnity was denied in *Barr* because of factual considerations governed by the law of the State of Utah, the holding concerning the *right* to seek indemnity is in no way disturbed or weakened by this result.

In *Certain Underwriters at Lloyd's v. United States,* 511 F.2d 159 (5th Cir. 1975), the Fifth Circuit expressed its disagreement with the conclusion reached by the Court of Appeals in *Wiener.* Although the Court in *Certain Underwriters* was considering a claim for contribution, and not a claim for indemnity, it reviewed relevant authority on the question of indemnity, which had been brought to its attention by one of the litigants. After reviewing that authority, particularly *Wellington* and *Barr,* the Court stated that:

> "We are in agreement with the expression in those opinions that *Feres* itself does not bar a third party suit against the United States for indemnity." 511 F.2d at 163.

While the precise question here present was not decided by the Fifth Circuit in *Certain Underwriters,* there can be little doubt that the Court there expressed its strong agreement with the conclusions reached on the question here present by the courts in *Wellington* and *Barr,* and its disagreement with the principles enunciated by the Court of Appeals in *Wiener,* and, therefore, in the instant case as well.

It should be brought to this Court's attention that on June 4, 1976, the Eighth Circuit, in an opinion as yet unpublished, aligned itself with the Court of Appeals, and against the Fifth, Sixth, and Tenth Circuits, on the precise question presented herein. *Donham v. United States,* ..... F.2d ....., No. 75-1516 (8th Cir., June 4, 1976). In its opinion, the Eighth Circuit discussed the relevant law at length, before concluding that the rationale of the *Feres* opinion bars a third-party claim for indemnity against the USA. After recognizing that the *Feres* opinion does not, in and of itself, bar such a claim, and after concluding that all relevant precedents are factually different, poorly reasoned, or non-persuasive[3], the court concluded that the rationale of the *Feres* opinion—the distinct relationship of the USA to its military personnel, and the lack of a civilian counterpart to that relationship—created a bar against the prosecution of claims for indemnity.

The Eighth Circuit opinion neglects the clear mandate of this Court in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), that because a perfect parallel can rarely be found in the civilian world to the relationship of the USA and its employees or the general public, or to the activities of the USA in its governmental capacity, a perfect parallel is not necessary to the imposition of liability against the USA under the Federal Tort Claims Act. If the USA,

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3. For example, the Eighth Circuit dismissed *Wellington Transportation Co. v. United States, supra,* as inapplicable on the ground that it was decided under federal maritime law. A careful reading of *Wellington,* however, shows beyond doubt that the Sixth Circuit expressly considered maritime principles, rejected them as inappropriate, and decided the case by reference to principles of basic negligence, a doctrine recognized in all jurisdictions, state and federal. Furthermore, *Wellington* was criticized as decided without reference to *Certain Underwriters,* despite the fact that the *Wellington* decision predated that in *Certain Underwriters* by two years.

through its employees, acted in a fashion which would render a civilian, acting in a similar fashion, liable, the USA may be held liable for its conduct, whether or not there are in fact civilians who perform the same or similar functions. In its reliance upon the purported rationale of *Feres*—the military relationship—to deny the right to prosecute indemnity claims, the Eighth Circuit stands alone.

From the foregoing, it is readily apparent that the greater weight of authority supports petitioner's contention that the prosecution of an action seeking tort or equitable indemnity against the USA should be allowed regardless of the inability of the person physically injured to bring suit directly against the USA, whether the bar against direct suit is the result of statute, or of court decision. The 1963 opinions of this Court appear to support the position of petitioner herein, a position unequivocally endorsed by the opinions of the Fifth, Sixth and Tenth Circuits. Against this weight of authority are the opinions of the Eighth and Ninth Circuits, opinions which expressly rely on a non-existent weight of authority in their favor, and which, it is respectfully submitted, are in error and should be overruled.

If one expands the inquiry regarding relevant case authority to include the broader issue outlined above, the alignment of United States Courts of Appeals in favor of petitioner and against the Court of Appeals herein does not change. In a case involving a *non-military* federal employee, covered under the FECA, the Third Circuit held that indemnity in favor of a third party who pays damages to that injured employee and against the USA is barred by the provisions of the FECA itself. *Travelers Insurance Co. v. United States,* 493 F.2d 881 (3d Cir. 1974).

The Court, in *Travelers,* reached its decision on the basis of its conclusion that it was following the greater weight of authority. A review of the authority relied upon by the Court in *Travelers,* however, demonstrates beyond dispute that the "weight of authority" relied upon was authority governing claims for *contribution,* rather than claims for *indemnity.* It is axiomatic that contribution and indemnity are two separate doctrines, governed by two separate principles, and available under entirely different circumstances. In the former the parties are joint tortfeasors, said to be *in pari delicto,* and damages are divided equally between them, but in the latter, the parties are not *in pari delicto,* and the damages are shifted so that the party primarily responsible bears the full consequences of the occurrence. *Atchison T. & S.F. Ry. Co. v. Lan Franco,* 267 Cal.App.2d 881, 886, 73 Cal.Rptr. 660 (1968).

Any impact of the *Travelers* opinion on the relevant "weight of authority" is offset by the opinion of the Fourth Circuit in *Wallenius Bremen G.m.b.H. v. United States,* 409 F.2d 994 (4th Cir.), cert. denied, 398 U.S. 958 (1969). In that case, the Fourth Circuit was very careful to delineate the clear distinction between contribution and indemnity, a distinction underlined by the purposes of the two different remedies, and by the functions of the two different remedies. The court concluded that indemnity should be available when the party against whom indemnity is sought owed a *duty* of his own to the injured person, whether or not the prospective indemnitor could also be held *liable* to the injured party:

> "But we are unable to see why in addition to breach of duty there must be indemnitor's *liability* to the injured party. If the purpose of indemnity is to relieve the relatively innocent wrongdoer and shift the burden to one whose conduct is more blameworthy, the

fact that the latter has a personal defense if sued by the injured person would seem to be irrelevant." 409 F.2d at 998.

The Court further expressed its opinion regarding the availability of indemnity in the absence of underlying liability on the part of the prospective indemnitor in unequivocal language:

> "As for the law of indemnity we think the better rule is that which rests the right of indemnity upon violation of the duty of care to the injured person rather than upon tort 'liability'." 409 F.2d at 998.

The addition of the foregoing two opinions to the above analysis does nothing but perpetuate and strengthen the split between the Circuits, leaving the greater weight of authority on the side of petitioner rather than on the side of the Court of Appeals.

Policy considerations, in addition to the greater weight of the applicable case authority, support the contentions of petitioner, rather than the conclusion of the Court of Appeals in the challenged judgment. The instant action presents the classic factual circumstances for the award of tort indemnity. For purposes of this petition, the USA owned and exclusively maintained, operated, inspected, and repaired the subject aircraft for sixteen years prior to the accident, and was actively and primarily negligent, as well as wanton and reckless. General Dynamics was, by comparison, at worst passively or secondarily negligent. The concept of equitable or tort indemnity was spawned by circumstances such as these and the inequities that can result in the absence of such indemnity.

A more crying need for the application of equitable or tort indemnity can hardly be imagined. If the plaintiffs in this action can prove that the subject aircraft had a

defect, however latent and insignificant, at the time it left General Dynamics' hands in 1954, and that the defect was *a* proximate cause of the crash of the subject aircraft in 1970, General Dynamics may have to respond, by judgment or settlement[4], with millions of dollars in damages, despite the fact that the USA may have been actively negligent in its handling and use of the subject aircraft, may have ignored all warnings, instructions, and recommendations of General Dynamics regarding the handling and operation of the aircraft, and may have, indeed, been reckless and wanton in its treatment of the subject aircraft. Equity requires, indeed demands, that General Dynamics be allowed to seek relief from this great potential liability, by being granted the opportunity to prosecute its claim and prove that the active negligence of the USA, or the reckless and wanton conduct of the USA, was the primary cause of the subject accident, and its resultant injuries and deaths.

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4. As a matter of fact, although not of record in the instant appeal, General Dynamics has compromised the claims of all plaintiffs by responding, in settlement, with millions of dollars in damages.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, and the judgment of that Court should be reversed.

Dated: AUG 12 1976

Respectfully submitted,

COOPER, WHITE & COOPER
R. BARRY CHURTON
NEIL L. SHAPIRO

By R. BARRY CHURTON
Attorneys for Petitioner
General Dynamics
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(Appendices Follow)

Appendix A

RECEIVED NOV 19 1974
Central District of California
Clerk, U. S. District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Shelley L. Adams and Diana L. Adams, Minors, by and through their Guardian Ad Litem, Toni L. Adams, and Susan Adams Kitchen and Toni L. Adams, *Plaintiffs,* vs. General Dynamics Corporation, et al., *Defendant and Third-Party Plaintiff,* vs. United States of America *Third-Party Defendant.*	Civil Nos: 72-77-PMH 72-84-PMH 72-78-PMH 72-85-PMH 72-79-PMH 72-86-PMH 72-80-PMH 72-87-PMH 72-81-PMH 72-88-PMH 72-82-PMH 72-89-PMH 72-83-PMH CONSOLIDATED ORDER

On May 23, 1973, the third-party defendant UNITED STATES OF AMERICA moved this Court to dismiss the third-party complaint for lack of jurisdiction under the Federal Tort Claims Act (FTCA; 28 U.S.C. 1346 and 2671 et seq.). On May 31, 1973, this Court denied said motion.

Subsequently, at the suggestion of the Court, the United States of America moved for reconsideration of its motion.

The United States of America's position is that this Court has no jurisdiction over it because where servicemen are involved, sovereign immunity has not been waived.

It is clear that a serviceman (or the survivors of a deceased serviceman) cannot recover against the United States for injuries suffered while performing duties incident to his service. *Feres v. United States,* 340 U.S. 135 (1950); *Lee v. United States,* 400 F.2d 558 (9th Cir., 1968) *cert den.,* 393 U.S. 1053 (1969). The *Feres* case was a judicial determination that the FTCA had not waived sovereign immunity in serviceman cases, and through that the District Court had no jurisdiction over the United States.

In this action the United States argues that since the plaintiffs cannot recover directly against the government, they should not be permitted to recover indirectly, by having the recovery pass through the hands of defendant and third-party plaintiff, General Dynamics Corporation. Authority for this position abounds: *United Air Lines v. United States,* 335 F.2d 379 (9th Cir., 1964) *cert.* dismissed, 379 U.S. 951 (1964); *Wein Alaska Airlines v. United States,* 375 F.2d 736 (9th Cir., 1967) *cert. den.* 389 U.S. 940; *Travelers Insurance Company v. United States,* 493 F.2d 881 (3rd Cir., 1974); *Di Girogio v. United States,* 372 F. Supp. 1373 (E.D. N.Y., 1974), *aff'd* 2nd Circuit, October 9, 1974.

Defendant and third-party plaintiff General Dynamics relies upon *Wallanius Breman G.M.B.H. v. United States,*

409 F.2d 994 (4th Cir.) cert. den. 398 U.S. 958 (1969) and *Treadwell Construction Co. v. U.S.,* 372 U.S. 597 (1963). Reliance on the *Treadwell* case is misplaced, because the Supreme Court did not decide the question it had, but merely vacated a lower court dismissal for reconsideration. Such can be precedent only for the procedure of vacating and reconsidering, and not for a substantive interpretation of the law.

While in the *Breman* case the Fourth Circuit did decide the question of third-party recovery against the United States contrary to the Ninth Circuit's *Weiner* decision, it mistakenly relied upon *Weyerhaeuser S.S. v. United States,* 372 U.S. 597 (1963). *Weyerhaeuser* was an admiralty case, and it turned upon the age-old traditional admiralty concept of divided damages. Here we are dealing with a recent statute (the FTCA was passed in 1946) and recent judicial interpretation thereof.

It appears to this Court that the only decisions which permit third-party recovery against the United States in this situation commence their reasoning with *Weyerhaeuser.* Because that reasoning is misapplied, and because the Court finds the Ninth Circuit approach in *Weiner* to be more correct, and clearly controlling, it is therefor,

ORDERED, that the earlier order of this Court dated May 31, 1973, denying the United States' Motion to Dismiss the third-party complaint, be and hereby is, VACATED, and it is further

ORDERED, that the United States Motion to Dismiss the third-party complaint be and hereby is, GRANTED.

The Court hereby certifies that it is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The Court indicated on September 11, 1974, that it would grant the motion but there was an indication that a cross-claim had been filed by the United States. Upon which suggestion the Court indicated it would defer the ruling for ten days to determine whether the Government had filed and would dismiss said claim. The Court also indicated it's desire for a proposed written order and would grant a certification under Title 28, Section 1292(b), FRCP.

The files in this case are in San Francisco and the Court and his clerk are in Los Angeles, which handicapped a search for the cross-claims. The Court did not receive information from the United States until September 19, 1974, that no cross-claim had been and probably would not be filed. At which time the undersigned granted the within order.

DATED: November 26, 1974.

PEIRSON M. HALL
PIERSON M. HALL, JUDGE
United States District Court

Appendix B

FILED APR 15 1976
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Shelley L. Adams, et al., *Plaintiffs,* vs. General Dynamics Corporation, et al., *Defendants.*	No. 74-3484 OPINION
General Dynamics Corporation, *Third-Party Plaintiff, Appellant,* vs. The United States of America, *Third-Party Defendant-Appellee.*	

On Appeal from the United States District Court
for the Northern District of California
Civil Nos. 72-77 PMH through 72-89 PMH (Consolidated)
Before WRIGHT and KILKENNY, Circuit Judges, and CHRISTENSEN, District Judge*
CHRISTENSEN, District Judge.

Under circumstances comparable to those of the present case, it was held in United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom,* United Air Lines v. United States, 379 U.S. 951 (1964), and reiterated in Wien Alaska Airlines, Inc. v. United States, 375 F.2d 736 (9th Cir.), *cert. denied,* 389 U.S. 940 (1967), that not-

* Senior United States District Judge for the District of Utah, sitting by designation.

withstanding differences in the character of the negligence charged against the respective defendants there could be no recovery of noncontractual indemnity against the United States by its codefendants because of the absence of underlying liability of the United States to the plaintiffs in those suits. Whether there are any significant distinctions in application or whether the doctrine of *Wiener* should be reexamined here is the burden of this appeal. Only because of appellant's earnest contention that intervening developments have thrown our prior decisions into question have we taken another look. And we have concluded both that *Wiener* is controlling and that there exists no justification for initiating the *en banc* consideration that would be essential under our rules for its being overruled.

The determinative facts have been stipulated for the purposes of this appeal. General Dynamics Corporation, third-party plaintiff in the court below and appellant here, in approximately June, 1954, supplied to the United States Air Force a military version of the Convair 240 civilian aircraft which it theretofore had designed, developed and manufactured. After June, 1954, and through the sixteen year period immediately preceding the accident which gave rise to this action, the United States had exclusive control of the operation, inspection, repair, and maintenance of this aircraft. On May 4, 1970, it crashed shortly after take-off. It was then piloted by a United States Air Force officer, carried a crew of four Air Force personnel, and had as passengers nine Air Force personnel and one member of the United States Army. All of these servicemen were on active duty and their activities at the time of the accident were incident to their military service. With the exception of one passenger who was seriously injured, all were killed in the crash.

Actions were filed[1] against General Dynamics by the representatives of the deceased crew members and passengers and by the sole surviving passenger in keeping with theories of negligence and strict liability. Thereafter, General Dynamics with leave of court filed a third-party complaint against the United States of America.

The United States moved to dismiss the third-party complaint. The district court initially denied the motion, but upon reconsideration the third-party complaint on the authority of *Wiener* was dismissed by order of November 26, 1974,[2] which also certified that the indemnity issue involved a controlling question of law as to which there was substantial ground for difference of opinion, and that an immediate appeal could materially advance the ultimate termination of the litigation. This court granted leave to appeal pursuant to 28 U.S.C. § 1292(b).

An examination of the respective pleadings has rendered clear that in addition to failure of the government to discover, correct or give warning of any faulty design or manufacture (which could have constituted negligence on the part of the government of the same kind or quality charged by plaintiffs against General Dynamics), the third-party complaint also charged the government with having negligently, recklessly and wantonly operated the aircraft and trained, instructed, and supervised its pilot and crew. For the purposes of the government's motion to dismiss, we must take these allegations as true.[3] Thus within the

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1. The actions were originally filed in California State courts, but were removed to the United States District Court for the Northern District of California and were there consolidated.

2. Adams v. General Dynamics Corporation, 385 F. Supp. 890 (N.D. Cal. 1974).

3. Cruz v. Beto, Corrections Director, 405 U.S. 319, 322 (1972); Securities & Exchange Com'n. v. Insurance Securities, 254 F.2d 642, 644 (9th Cir.), *cert. denied*, 358 U.S. 823 (1958).

teachings of *Wiener*, if indemnity is not recoverable against the government, it must be for a reason other than the indemnitor and the indemnitee were *in pari delicto*.[4] We thus are confronted directly with *Wiener's* holding that the absence of any underlying liability of the plaintiffs to the government is fatal to the claim for indemnity.[5]

4. United Air Lines, Inc. v. Wiener, *supra*, at 398-402. See also Security Insurance Co. of New Haven v. Johnson, 276 F.2d 182 (10th Cir. 1960), quoted in *Wiener* at 401 as expressing the general principles governing the problem arising in Nevada in the absence of local decisions to the contrary. We find nothing in the decisions of the courts of California, where the present cases arose, at variance with these principles as approved in *Wiener*. *See* Great American Insurance Co. v. Evans, 269 F. Supp. 151 (N.D. Cal. 1967); Green v. Los Angeles, 40 Cal. App. 3d, 115 Cal. Rptr. 685 (1974); San Mateo Union High School Dist. v. Yamas, 22 Cal. App. 3d 185, 99 Cal. Rptr. 258 (1971); Atchison T. & S.F. Ry. v. Lan Franco, 277 Cal. App. 2d 881, 73 Cal. Rptr. 660 (1968); Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964); Cahill Brothers, Inc. v. Clementina Co., 208 Cal. App. 2d 367; 25 Cal. Rptr. 301 (1962); De La Forest v. Yandle, 171 Cal. App. 2d 59, 340 P.2d 52 (1959); San Francisco Unified School Dist. v. Cal. Bldg., Main Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958).

5. Barr v. Brezina Construction Co., 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), is cited by appellant as supporting its position that indemnity is allowable under the circumstances of the present case. In that case, views were expressed concerning this problem somewhat inconsistent with the holding in *Wiener* and, indeed, inconsistent with the decision of the trial judge there, who is a member of the present panel as well as the author of Security Insurance Company of New Haven v. Johnson, 276 F.2d 182 (10th Cir. 1960), *supra*. *Barr* also involved the ruling of the district court that indemnity should be denied for the additional reason that the negligence charged against the respective parties, notwithstanding possible differences in degree, was essentially of the same kind or quality, i.e., negligent design on the one hand, and negligent construction pursuant to such design, on the other. The judgment of the trial court was affirmed on the latter basis. By further curious coincidence, another member of the present panel was involved as visiting circuit judge in the *Barr* case. These convuluted exposures with the problem have led to a revisitation of *Wiener* from a variety of viewpoints none of which, as already indicated, persuades us that it should be overruled.

Apart from reargument of matters thoroughly considered in the earlier decisions of this court, appellant relies principally upon the sequela of the order of remand in Treadwell Construction Co. v. United States, 372 U.S. 772 (1963),[6]

6. The court in *Wiener* took note of the remand in *Treadwell* but perceived nothing militating against its conclusion. The district court on remand again concluded that the exclusive remedy provision was not available as a defense to a third party action against the United States. Drake v. Treadwell Constr. Co., Civil No. 14517 (W.D. Pa. Order of May 24, 1963, and July 9, 1963). The government again appealed but later moved for dismissal upon recommendation of the Solictor General. The following comment is pertinent: "The Court in Busey v. Washington, 225 F. Supp. at 421, seemed to find some significance in the fact that the Supreme Court in Drake v. Treadwell Constr. Co., 372 U.S. 772 (1963), did not reverse the court of appeals but merely vacated its judgment and remanded. This distinction was obviously not so clear to the Fourth Circuit which felt that the Supreme Court's remand in *Treadwell* indicated that 'the court may have thought that other types of obligations [than divided damages claims in admiralty] were intended to be undisturbed by' the FECA. Wallenius Bremen G.m.b.H. v. United States, 409 F.2d 994, 997. That the lower courts have been forced to prospect for substance in actions of the Supreme Court of so little manifest significance is certainly indicative of the unspoken realization on the part of these courts that the Supreme Court has in fact left the issue squarely undecided." Note, *Federal Law—Contribution and Indemnity Under the Federal Employees' Compensation Act*, 6 TOLEDO L. REV. 272, 282, n. 42 (1974).

and a subsequent decision of the Fourth Circuit.[7] However, we are convinced that the validity of *Wiener* has not been thrown into substantial question. On the contrary, the increasing weight of authority, as well as the better reasons, appear to support it.[8]

Accordingly, we affirm the judgment of the district court which accepted *Wiener* as controlling.

---

7. Wallenius Bremen G.m.b.H. v. United States, 409 F.2d 994 (4th Cir. 1969); *cert. denied*, 398 U.S. 958 (1970), *supra*.

8. The more recent case of Travelers Insurance Co. v. United States, 493 F.2d 881 (3d Cir. 1974), *supra*, expressly relies upon *Wiener*. And the following appears to be a fair summary of the present state of circuit authority generally: "The issue is whether the exclusive remedy provision of the Federal Employee's Compensation Act bars the claim of a third party under the Federal Tort Claims Act for indemnity or contribution against the Federal Government for damages paid to an injured government employee. Two 1963 decisions of the Supreme Court have given rise to what one court calls 'hopeless conflict' among the lower federal courts. At least four circuits have now held that recovery is precluded; a 1969 Fourth Circuit decision holds otherwise. The issue has been unresolved for ten years with at least one denial of certiorari since the conflict arose, and it was the subject of a detailed Third Circuit opinion in 1974." (Citation omitted.) Report of Commission on Revision of the Federal Court Appellate System, Appendix B, 67 F.R.D. 195, 283-4 (1975).

Appendix C

FILED
May 26, 1976
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Shelley L. Adams, et al., *Plaintiffs,* vs. General Dynamics Corporation, et al., *Defendants.*	No. 74-3484 ORDER
General Dynamics Corporation, *Third-Party Plaintiff, Appellant,* vs. The United States of America, *Third-Party Defendant, Appellee.*	

Before: WRIGHT and KILKENNY, Circuit Judges, and CHRISTENSEN, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Kilkenny have voted to reject the en banc suggestion.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: May 25, 1976.

Supreme Court, U. S.
FILED
OCT 22 1976
MICHAEL RODAK, JR., CLERK

No. 76-220

In the Supreme Court of the United States

OCTOBER TERM, 1976

GENERAL DYNAMICS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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GENERAL DYNAMICS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 535 F. 2d 489. The order of the district court (Pet. App. A) is reported at 385 F. Supp. 890.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1976, and a timely petition for rehearing was denied on May 26, 1976 (Pet. Apps. B and C). The petition for a writ of certiorari was filed on August 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for third-party claims seeking

indemnity for damages paid to servicemen injured or killed in activity incident to military service.

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof.

STATEMENT

This case arose out of the crash of a United States Air Force plane and the resulting deaths of active-duty military personnel who at the time of the crash were engaged in activities incident to military service. A stipulation of facts filed with the district court shows that during the latter part of the 1940's, petitioner designed, developed, and manufactured a civilian aircraft, designated as the Convair 240. Pursuant to a contract with the United States, petitioner supplied the United States Air Force with a model of the Convair 240 for use as a military aircraft. The aircraft was given the military designation "T-29." (Pet. 4.)

In 1954 petitioner delivered to the Air Force a T-29 bearing the registration number 5822. On May 4, 1970, aircraft No. 5822 crashed shortly after takeoff from Hamilton Air Force Base in Marin County, California. The aircraft, piloted by an Air Force officer, carried a crew of four Air Force personnel and an additional nine Air Force personnel and one member of the United States Army as passengers. All persons aboard the aircraft, with the exception of one passenger, were killed in the crash. All of the servicemen were on active duty and their activities at the time of the accident were incident to their military service. (Pet. 4-5.)

In April 1971, actions were filed against petitioner by the representatives of the deceased crewmembers and passengers, and by the sole surviving passenger, seeking recovery under theories of negligence and strict liability. On February 8, 1973, petitioner, by leave of court, filed a third-party complaint against the United States, alleging that the United States had been negligent in the inspection, maintenance, repair, and operation of the aircraft, and seeking indemnity for any damages that

petitioner might be required to pay to the various plaintiffs. The United States moved to dismiss the third-party complaint, contending that because it could not be liable directly to plaintiffs for death or injury, it could not be held liable for essentially the same damages by way of indemnity to a third party. The motion was granted by the district court (Pet. App. A). On interlocutory appeal, the court of appeals affirmed (Pet. App. B).

ARGUMENT

1. Petitioner contends (Pet. 6-16) that one who is liable for damages on account of the injury or death of a serviceman may seek indemnity against the United States under 28 U.S.C. 1346(b) even though the United States is not directly liable to the serviceman. The court of appeals correctly rejected this contention. The court's judgment affirming the dismissal of petitioner's third-party complaint is supported by two alternative rationales: (a) that the Federal Tort Claims Act does not permit suits for indemnity by third parties who are liable to servicemen for injuries occurring while on active duty; and (b) that common law principles preclude indemnity under a tort theory in situations where, as here, the indemnitor is not directly liable to the injured party.

a. Petitioner rests his claim against the United States upon the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2674. But in *Feres* v. *United States*, 340 U.S. 135, the Court determined that the Act, which provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *," 28 U.S.C. 2674, does not permit suits against the United States alleging liability in tort for the injury or death or a serviceman engaged in his duty. The Court pointed out that whereas the Act provides that "the law of the place where the act or omission * * * occurred" (*ibid.*) shall govern the United States' liability

under the Act, the "relationship between the Government and members of its armed forces is 'distinctively federal in character' * * * " (340 U.S. at 143). The Court therefore concluded that the Act did not create a "new cause of action dependent on local law for service-connected injuries or death due to negligence" (340 U.S. at 146).

Though *Feres* involved a claim brought directly against the United States on behalf of a serviceman, the same analysis is also appropriate in the context of tort indemnity claims. Imposition of liability for such claims, like imposition of direct liability, would subject the relationship between the United States and its military personnel to the idiosyncracies of state tort law, a result that would be incompatible with the Court's conclusion in *Feres* that "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority" (340 U.S. at 143-144). Moreover, tort indemnity would involve the military in tort litigation disruptive of discipline and the orderly conduct of military affairs. As the Court explained in *United States* v. *Brown*, 348 U.S. 110, 112:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.[1]

---

[1]The imposition of indirect liability also would upset the balance struck by Congress in the veterans' compensation statutes between public responsibility for injuries to servicemen and the enormous potential liability arising from the dangers of military service. See 38 U.S.C. 301, *et seq.*, 401, *et seq.*, and 601, *et seq.*

b. Furthermore, common law principles preclude indemnity or contribution under a tort theory because the United States is not directly liable for the injuries incurred by plaintiffs. See *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, 403 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (and cases therein cited); *Maddux* v. *Cox*, 382 F. 2d 119, 124 (C.A. 8); *Newport Air Park, Inc.* v. *United States*, 419 F. 2d 342 (C.A. 1); *Galimi* v. *Jetco, Inc.*, 514 F. 2d 949 (C.A. 2); *Travelers Insurance Co.* v. *United States*, 493 F. 2d 881 (C.A. 3). As the Ninth Circuit explained in *United Air Lines* v. *Wiener, supra*, 335 F. 2d at 403: "The courts have consistently held that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity."[2] Petitioner asserts no claim under an express or implied contract of indemnity, and the United States is not directly liable to the injured parties. *Feres* v. *United States, supra*. Accordingly, even if the Federal Tort Claims Act did permit an indemnity claim for service-connected injuries, the substantive common law would preclude recovery by petitioner (see Pet. App. B).

2. Contrary to petitioner's contention (Pet. 7-9, 11-18), the decision of the court of appeals does not conflict with the decisions in other circuits. While the four circuits that

[2]This doctrine prevents the frustration of statutorily restricted liability schemes by limiting the financial exposure of government to the statutory liability to which it has acceded. See *Cooper Stevedoring Co., Inc.* v. *Kopke, Inc.*, 417 U.S. 106, 115; *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915; *Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373 (E.D. N.Y.), affirmed, 505 F. 2d 727 (C.A. 2), certiorari denied, 420 U.S. 990; *Busey* v. *Washington*, 225 F. Supp. 416, 423 (D. D.C.). It also insures that, in a commercial context, subsequent court action will not undermine the allocation of risks explicit or implicit in the contractual undertaking.

have addressed the issue whether the United States is liable under the Act for third-party claims seeking indemnity in a military context have not adopted harmonious rationales (see *Donham* v. *United States*, 536 F. 2d 765 (C.A. 8), petition for a writ of certiorari pending *Sub nom. Stencel Aero Engineering Corp.* v. *United States* (No. 76-321); *United Air Lines* v. *Wiener, supra; Barr* v. *Brezina Construction Co.*, 464 F. 2d 1141 (C.A. 10), certiorari denied, 409 U.S. 1125; *Certain Underwriters at Lloyd's* v. *United States*, 511 F. 2d 159 (C.A. 5)),[3] each has precluded tort indemnity recovery against the United States.

In *United Air Lines* v. *Weiner, supra*, which was reaffirmed by the court of appeals here (Pet. App. B), the Ninth Circuit rejected a third-party claim for indemnity arising from servicemen's injuries "for the reason that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arose out of or are in the course of, activity incident to service" (335 F. 2d at 404). In *Donham* v. *United States, supra*, the Eighth Circuit rejected a similar third-party indemnity claim on the ground that the rationale of *Feres* v. *United States, supra*, compelled the conclusion that the United States had not waived sovereign immunity from such claims (536 F. 2d at 768-770).

[3]*Wellington Transportation Co. v. United States*, 481 F. 2d 108 (C.A. 6), also discussed by petitioner (Pet. 11-12), is inapposite. The claim in *Wellington* was brought under the Public Vessels Act, which, this Court has stated (*Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600), "was intended to impose on the United States the same liability * * * as is imposed by admiralty law on the private shipowner * * *." The indemnity claim there was for attorneys' fees, and the Sixth Circuit held simply that *Feres* would not bar the longstanding right to attorneys' fees "that under federal maritime law * * * are consistently awarded * * *" (481 F. 2d at 111). The court remanded the case for further findings concerning the nature of appellant's fault. Neither the Public Vessels Act nor a longstanding right to indemnity is involved in this case, and, thus, the decision in *Wellington* does not conflict with the decision here.

In the other two cases, *Barr* v. *Brezina*, *supra*, and *Certain Underwriters at Lloyds* v. *United States*, *supra*, upon which petitioner principally relies, the courts of appeals stated that the *Feres* holding did not itself prohibit third-party indemnity claims against the United States.[4] However, the courts in both cases found that on the facts before them, the common law or statutory requirements for indemnity could not be met. Thus, no court of appeals has held the United States liable for the kind of indemnity that petitioner seeks here.

3. Nor is the decision below contrary to the cases in this Court concerning injuries to non-military government employees. In *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, a suit brought under the Public Vessels Act, this Court held that the Federal Employees Compensation Act ("FECA") did not have the effect of eliminating an otherwise existing third-party right of action. Unlike the present case, *Weyerhaeuser* concerned no new tort remedy, but rather "a rule of admiralty law which, for more than 100 years, has governed * * * the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault" (372 U.S. at 603). "[T]he single question [in *Weyerhaeuser* was] whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified * * * by the exclusive liability provision of the federal compensation statute" (372 U.S. at 600).[5] The principle

[4]At the same time, neither court gave explicit consideration to whether the rationales underlying the decision in *Feres* are applicable in a third-party context. Cf. *Donham* v. *United States*, *supra*, 536 F. 2d at 772-773.

[5]*Treadwell Construction Co.* v. *United States*, 372 U.S. 772, similarly concerned the question whether the FECA abrogated third party remedies against the United States that might otherwise have been available to a joint tortfeasor. The Court, without deciding the issue,

established in *Weyerhaeuser* is that the FECA was not intended to affect third party rights under settled doctrines of admiralty law. That principle has no bearing on this case, in which the question is not whether a statute by implication extinguished liability for indemnity that already existed but, conversely, whether a statute—the Federal Tort Claims Act—creates a liability for indemnity that did not exist before.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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summarily vacated the court of appeals' judgment in favor of the United States and remanded the case for further consideration in light of the intervening decision in *Weyerhaeuser*. See *Donham* v. *United States*, *supra*, 536 F. 2d at 772, n. 9.

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